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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. BRIAN TROY ECKHARDT, Appellant.	2 CA-CR 2009-0083 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20082140

Honorable Hector E. Campoy, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Kathryn A. Damstra — Tucson
Attorneys for Appellee

R. Lamar Couser — Tucson
Attorney for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial, appellant Brian Eckhardt was convicted of possession of a deadly weapon by a prohibited possessor and sentenced to a three-year term of imprisonment. On appeal, Eckhardt contends the trial court erred in denying his

motion to suppress and motion for mistrial. He also challenges the sufficiency of the evidence supporting his conviction. Finding no error, we affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to upholding the jury's verdict. *See State v. Haney*, 223 Ariz. 64, n.1, 219 P.3d 274, 276 n.1 (App. 2009). On April 16, 2008, Tucson police officer Chriswell Scott stopped Eckhardt for walking into an intersection in violation of a pedestrian signal. After furnishing his identification card to the officer, Eckhardt turned his back and moved his hands near his waistband. When the officer began to circle Eckhardt and ordered him to show his hands, Eckhardt turned his body so that his back remained toward the officer. The officer then drew his gun and ordered Eckhardt to put up his hands. As Eckhardt complied with this order, a gun fell out of his pants and onto the ground.

¶3 After being handcuffed and advised of his rights, Eckhardt admitted he owned the gun and did not have a concealed-weapons permit. Before the gun incident, the officer had requested a routine background check over his radio. The results of that check did not reveal any outstanding warrants, prior convictions, or limitations on Eckhardt's right to possess a firearm. A computer check performed by the officer yielded similar results. It was later discovered that Eckhardt had a prior conviction in Pima County for possession of a narcotic drug for sale, a class two felony.

¶4 A Pima County grand jury indicted Eckhardt on one count of possession of a deadly weapon by a prohibited possessor.[1] At trial, the state established Eckhardt had a prior felony conviction through the testimony of his former probation officer and by introducing a copy of his record of conviction. The jury found him guilty as charged, and this appeal followed.

Sufficiency of the Evidence

¶5 Eckhardt maintains the trial court erred in denying his motion for judgment of acquittal because his successful completion of probation and the background checks performed by the arresting officer constituted evidence that Eckhardt was not prohibited from carrying a firearm. It follows, Eckhardt contends, that the state was required to present evidence showing his civil rights had not been restored. Because no such evidence was offered, Eckhardt concludes the state did not carry its burden of proof and the court erred in denying his motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P.[2]

¶6 A trial court should grant a judgment of acquittal pursuant to Rule 20 "only where there is no substantial evidence to warrant conviction." *State v. Fernane*, 185 Ariz. 222, 224, 914 P.2d 1314, 1316 (App. 1995). This court "will find reversible error

[1]Eckhardt originally was charged with carrying a concealed weapon without a permit, but this misdemeanor charge ultimately was dismissed by the Tucson City Court. *See* A.R.S. § 13-3102(A)(1), (L).

[2]To the extent Eckhardt is challenging the adequacy of the indictment, he has forfeited any such argument on appeal by his failure to raise timely the issue below. *See* Ariz. R. Crim. P. 13.5(e) (defects in charging document must be raised by pretrial motion pursuant to Rule 16.1, Ariz. R. Crim. P.).

based on insufficient evidence only where there is a complete absence of probative facts to support a conviction." *Id.* "'If reasonable [persons] may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.'" *State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004), *quoting State v. Rodriguez*, 186 Ariz. 240, 245, 921 P.2d 643, 648 (1996) (alteration in *Rodriguez*). We therefore resolve all conflicts in the evidence in favor of sustaining the verdict. *State v. Girdler*, 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983).

¶7 Here, the state charged Eckhardt with violating former A.R.S. § 13-3102(A)(4), 2006 Ariz. Sess. Laws, ch. 313, § 1, by being a "prohibited possessor" in possession of a firearm. As defined by former A.R.S. § 13-3101(A)(6)(b), a "[p]rohibited possessor" includes anyone "convicted . . . of a felony . . . whose civil right to possess or carry a gun or firearm has not been restored." 2006 Ariz. Sess. Laws, ch. 221, § 3. The nonrestoration of a defendant's civil rights is not an element of the offense. *State v. Kelly*, 210 Ariz. 460, ¶ 11, 112 P.3d 682, 685 (App. 2005). Rather, restoration is an exception under the prohibited possessor statutes that must be proved by the defendant. *Id.* ¶¶ 6, 10. A defendant seeking to avail himself of this exception carries the burden of both producing evidence and persuading the trier of fact that his rights have been restored. *Id.* ¶¶ 13, 15.

¶8 Contrary to Eckhardt's argument, the evidence presented here neither tended to show his rights had been restored nor affected the state's evidentiary burden. The preliminary background checks performed by the arresting officer did not suggest Eckhardt's right to carry a firearm had been restored any more than they proved he had

never been convicted of a felony. This evidence simply demonstrated the databases being searched were incomplete. Indeed, the record of Eckhardt's conviction underscored Officer Scott's testimony that the radio and computer checks he performed would not always reveal prior convictions. The fact Eckhardt had completed probation successfully similarly lacked probative value, as Eckhardt's former probation officer clarified that completing probation would not result in automatic restoration of the probationer's civil rights.

¶9 To the extent reasonable minds could differ about whether Eckhardt was exempt from the prohibited-possessor statutes given the evidence presented, the trial court properly denied Eckhardt's motion and submitted the charge to the jury. *See Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d at 477. Its verdict of guilt resolved this factual issue and was supported by substantial evidence. *See Kelly*, 210 Ariz. 460, ¶ 15, 112 P.3d at 686 (defendant "has the burden of persuading the trier of fact by a preponderance of the evidence that his civil rights have been restored"). We therefore find no error in the court's denial of Eckhardt's Rule 20 motion.

Motion to Suppress

¶10 Eckhardt next contends the trial court erred in denying his motion to suppress evidence obtained after he was detained. As he did below, Eckhardt argues on appeal that "[t]he police without justification conducted a warrants and criminal history check during this civil traffic offense stop." Specifically, he asserts "there [was] no evidence that he was engaged in criminal activity or that he posed a threat to Officer Scott's safety" and, consequently, "the officer exceeded his lawful authority by detaining

[Eckhardt] and tacking onto this situation a radio check of [his] past history," rather than simply issuing a civil traffic citation.

¶11 "We review the denial of a motion to suppress evidence for a clear abuse of discretion, viewing the evidence presented at the suppression hearing in the light most favorable to upholding the trial court's factual findings and reviewing its legal conclusions de novo." *State v. Esser*, 205 Ariz. 320, ¶ 3, 70 P.3d 449, 451 (App. 2003); *see also State v. Newell*, 212 Ariz. 389, ¶ 22, 132 P.3d 833, 840 (2006).

¶12 At the suppression hearing, Officer Scott testified he had stopped Eckhardt for a suspected traffic violation, had obtained Eckhardt's identification, and had talked with Eckhardt for approximately two minutes before requesting a background check over the radio. Scott testified he followed the police department's normal procedure in requesting the background check, which served both to verify Eckhardt's information and to reveal whether he had any outstanding warrants. The results of such background checks typically are reported in a matter of minutes; in this case, the results apparently were returned about two minutes after the request.

¶13 As noted above, Eckhardt does not challenge the validity of his initial stop, nor does he dispute that his actions while the background check was under way gave the officer cause to believe Eckhardt may have posed a threat to the officer's safety.[3]

[3]Although Eckhardt broadly asserts in his reply brief that "[a]t no time during the events did the officer have any reasonable suspicion that [Eckhardt] . . . was armed and dangerous . . . or that there was any issue of officer safety," we regard this statement as merely imprecise. To the extent Eckhardt attempts to raise issues not presented in his opening brief, we will not address them. *See State v. Ruggiero*, 211 Ariz. 262, n.2, 120 P.3d 690, 695 n.2 (App. 2005) (issues first raised in reply brief generally waived).

Instead, Eckhardt suggests Scott exceeded the permissible scope of the stop by requesting the background check, thereby violating Eckhardt's right to be free from unreasonable seizures under the United States and Arizona Constitutions, as well as A.R.S. § 28-1594.[4]

¶14 Generally, police officers may not prolong a traffic stop beyond the time necessary to conduct inquiries related to the stop and issue a warning or ticket. *See Illinois v. Caballes*, 543 U.S. 405, 407-08 (2005); *Florida v. Royer*, 460 U.S. 491, 500 (1983). However, an officer does not prolong an otherwise lawful stop unreasonably by asking brief questions unrelated to it. *E.g.*, *State v. Teagle*, 217 Ariz. 17, ¶ 24, 170 P.3d 266, 272 (App. 2007); *see United States v. Childs*, 277 F.3d 947, 954 (7th Cir. 2002) ("Questions that hold potential for detecting crime, yet create little or no inconvenience, do not turn reasonable detention into unreasonable detention."). Warrant checks, in particular, during valid investigatory stops have been approved. *State v. Ybarra*, 156 Ariz. 275, 276, 751 P.2d 591, 592 (App. 1987).

¶15 Here, Scott's radio background check was related to the traffic stop because its purpose, in part, was to confirm the validity of the identification Eckhardt had provided and thereby allow Scott to issue a citation. The record does not suggest the officer's brief delay in requesting the background check or the background check itself unreasonably prolonged Eckhardt's detention. Accordingly, the trial court did not err in denying his motion to suppress.

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[4]Section 28-1594 provides: "A peace officer or duly authorized agent of a traffic enforcement agency may stop and detain a person as is reasonably necessary to investigate an actual or suspected violation of this title and to serve a copy of the traffic complaint for an alleged civil or criminal violation of this title."

Motion for Mistrial

¶16 Eckhardt also contends the trial court erred in denying his motion for mistrial, which was based on "the state['s] alluding to [Eckhardt's] not testifying." During the state's rebuttal argument, the prosecutor addressed defense counsel's general attacks on the reliability of the state's evidence and his suggestion that the state should have looked for fingerprints on the gun recovered from Eckhardt. After arguing that Scott's testimony was reliable and suggesting further evidence was unnecessary, the prosecutor remarked: "[T]he next thing [defense counsel] is going to be asking is that we have you there at the scene of the crime so you can witness it firsthand. You weren't there. I wasn't there. [Defense counsel] wasn't there. You only heard from Officer Scott."

¶17 When Eckhardt objected, the trial court "caution[ed] counsel to not insinuate anything inappropriate." The prosecutor then stated:

> It's clear from the judge's instructions that the defendant has no obligation to testify and I am certainly not trying to suggest that. What I am suggesting is that we did hear from one of the people who was on the scene. I was not there. You weren't there, so you can't tell us what happened. Mr. Eckhardt has no obligation to tell us what happened. He has a right under the Constitution to sit here and not present evidence. It's all my burden. And that is why we got Officer Scott.

After the jury had retired to deliberate, Eckhardt renewed his objection and moved for a mistrial. The trial court denied the motion, finding a mistrial was not "manifestly necessary."

¶18 A mistrial "is the most dramatic remedy for trial error" and should be granted "only when justice will be thwarted if the current jury is allowed to consider the case." *State v. Nordstrom*, 200 Ariz. 229, ¶ 68, 25 P.3d 717, 738 (2001).

> The trial judge is in the best position to determine whether a particular incident calls for a mistrial because the trial judge is aware of the atmosphere of the trial, the circumstances surrounding the incident, the manner in which any objectionable statement was made, and the possible effect on the jury and the trial.

State v. Williams, 209 Ariz. 228, ¶ 47, 99 P.3d 43, 54 (App. 2004). We therefore ordinarily defer to a trial court's "discretionary determination," *State v. Dann*, 205 Ariz. 557, ¶ 43, 74 P.3d 231, 244 (2003), and we will not disturb its ruling absent a clear abuse of discretion. *State v. Murray*, 184 Ariz. 9, 35, 906 P.2d 542, 568 (1995); *State v. Slover*, 220 Ariz. 239, ¶ 19, 204 P.3d 1088, 1094 (App. 2009).

¶19 "The Fifth Amendment of the United States Constitution, [a]rticle [II, § 10], of the Arizona Constitution, and A.R.S. [§] 13-117(B) prohibit any comment, direct or indirect, by a prosecutor about the failure of a defendant to testify." *State v. Rutledge*, 205 Ariz. 7, ¶ 26, 66 P.3d 50, 55 (2003). A prosecutor's comment runs afoul of these statutory and constitutional prohibitions if it is adverse to the defendant and invites the jury to draw an inference of guilt from the exercise of his or her right to silence. *State v. Schrock*, 149 Ariz. 433, 438, 719 P.2d 1049, 1054 (1986); *State v. Church*, 175 Ariz. 104, 107, 854 P.2d 137, 140 (App. 1993); *see also State v. Guerrero*, 173 Ariz. 169, 172, 840 P.2d 1034, 1037 (App. 1992) ("A comment [on a defendant's invocation of the right to remain silent] does not constitute reversible error unless the

prosecution draws the jury's attention to the defendant's exercise of the right to remain silent and uses it to i[mply] guilt.").

¶20 Here, the prosecutor's remarks largely mirrored the trial court's instructions regarding the presumption of innocence, the state's burden of proof, and the defendant's election not to testify or present evidence. The court had previously instructed the jury:

> The state must prove guilt beyond a reasonable doubt with its own evidence. A defendant is not required to produce evidence of any kind. The decision on whether to produce any evidence is left to the defendant acting with the advice of an attorney. The defendant's failure to produce any evidence is not evidence of guilt.

The court similarly had instructed the jury that "[t]he defendant is not required to testify" and, therefore, jurors could not let the defendant's choice not to testify affect their deliberations or lead them to conclude the defendant was likely to be guilty.

¶21 When determining whether a prosecutor's comments were improper, a trial court must view them in their entire context and assess how they were perceived by the jury. *See Rutledge*, 205 Ariz. 7, ¶ 33, 66 P.3d at 56. Here, the prosecutor reminded the jurors they could draw no conclusions from Eckhardt's refusal to testify and essentially repeated the court's instructions. *Cf. Church*, 175 Ariz. at 107, 854 P.2d at 140 (finding defendant's rights not violated when prosecutor's remarks affirmed defendant's right not to testify and "did not urge the jury either to draw an unfavorable inference or to impose a penalty on [the] defendant for the exercise of the right to silence"). In light of these remarks, the prosecutor's statements could properly be construed as an explanation why the state did not present further evidence, not as an invitation to interpret the defendant's

silence as evidence of his guilt. Although the court correctly cautioned the prosecutor that the best practice for the state is to avoid any reference at all to a defendant's right not to testify, the court did not err or abuse its discretion in finding the prosecutor's statements, taken in context, did not require a mistrial.

¶22 Furthermore, even if we were to assume arguendo that those statements constituted an impermissible comment on Eckhardt's failure to testify, we would nevertheless find the error to be harmless beyond a reasonable doubt. *See Rutledge*, 205 Ariz. 7, ¶ 32, 66 P.3d at 56 (comment on refusal to testify subject to harmless-error analysis); *accord State v. Trostle*, 191 Ariz. 4, 16, 951 P.2d 869, 881 (1997); *State v. Guerra*, 161 Ariz. 289, 297, 778 P.2d 1185, 1193 (1989). A mistrial or reversal is required in a criminal case "only if it appears reasonably possible that the error might have materially influenced the jury." *State v. Celaya*, 135 Ariz. 248, 256, 660 P.2d 849, 857 (1983). Given the overwhelming evidence of Eckhardt's guilt, we find no cause to disturb his conviction. *See State v. Davolt*, 207 Ariz. 191, ¶ 64, 84 P.3d 456, 474 (2004) (overwhelming evidence of guilt rendered error harmless).

Disposition

¶23 For the foregoing reasons, Eckhardt's conviction and sentence are affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge